

- [3] I also found Mr Stevenson was owed wages for (alternate) days in lieu of statutory holidays worked and interest on the same and that he was owed holiday pay per s. 23 of the Holidays Act 2003: arrangements were agreed by the parties to seek the assistance of a labour inspector and leave was provided the parties to return these matters to the Authority if quantum could not be agreed.
- [4] By application dated 17 March the Company seeks a stay of proceedings on the grounds that, amongst other things, it has filed (on 12 March) a *de novo* challenge against the findings and orders of the Authority and that it was ordered to pay unspecified amounts, such amounts to be on an ultimately agreed basis. The Company argues more costs will be incurred to complete the process including the possibility of mediation whereas, if the challenge is successful, the work required in finalising quantum will not be required: it is in the interests of both parties to await the Employment Court's decision.
- [5] In an application to the Employment Court filed on 26 March Mr Stevenson sought leave to challenge the same determination.
- [6] In submissions received today Mr Stevenson opposes the application for a stay of proceedings and seeks costs in respect of the Authority's substantive investigation of \$3,000 plus disbursements. A further communication from his counsel, Mr Petherick, advises legal aid granted to date (excluding that granted for mediation) totals \$5,698 plus disbursements of \$414.32.
- [7] Mr Stevenson submits that the quantum of holiday pay arrears will be known in the near future, that the process involving the labour inspector entails no additional costs and that – if successful – he is entitled to receive the amounts owed and the Company should not be able to continue to benefit from the use of this money (Mr Stevenson having been entitled to the funds at the termination of his employment in June 2008).

Discussion and Findings

- [8] Both parties are now challenging various aspects of the Authority's substantive determination: Mr Stevenson is reiterating his claim he was unjustifiably disadvantaged and similarly dismissed whereas the Company disputes the findings resulting in a penalty for failing to provide a written

employment agreement and payment for alternative days owing and holiday pay and interest on both.

[9] The stay sought by the Company relates to the penalty awarded to the Crown and findings in favour of Mr Stevenson's claim for payment for alternate days, holiday pay and interest.

[10] Section 180 of the Act provides that the operation of s. 179 (i.e. challenging a determination of the Authority) does not operate as a stay of proceedings unless the Employment Court or the Authority orders a stay.

[11] Regulation 64 of the Employment Court Regulations 2000 provides that the Authority has the power to order a stay of proceedings if a challenged is filed under s. 179 of the Act.

[12] The rules relating to stay applications are summarised in *New Zealand Post Primary Teachers' Assn v Attorney-General (on behalf of Ministry of Education) (No 3)* [1991] 3 ERNZ 708, 709:

- i. *If no stay is granted, will the applicant's right of appeal be rendered nugatory?*
- ii. *Will the successful party be injuriously affected by a stay?*
- iii. *The bona fides of the applicant as to prosecution of the appeal.*
- iv. *The novelty and importance of the question involved.*

[13] In *Yong, (t/a Yong and Co Chartered Accountants) v Chin* [2008] 1 ERNZ 1, Couch J observed:

As is the case with all ... general discretions ... it must be exercised judicially and according to principles. The scope of the power must be determined in the context of the Employment Relations Act 2000 as a whole and in light of the principles applicable ... generally.

(para 12)

[14] Having regard to the speed with which the Crown pursues penalties awarded to it in the employment jurisdiction, it could be concluded that if no stay was granted the applicant – the Company's – right of appeal would not be rendered nugatory. However, it would be unfair to burden the Company with the reality of being knowingly in breach of its obligation by allowing the

penalty to slip in that manner. Besides, a novel and important question is being raised by the Company in this matter: it agrees it breached s. 65 of the Act but says the Authority's finding the 12 month period under s. 135 commenced when Mr Stevenson's counsel advised of the right to bring a penalty action was wrong.

- [15] Also, the injured party (the Crown) will not be injuriously affected by a stay.
- [16] There are no reasons to challenge the *bona fides* of the applicant (the Company), particularly as both parties have, or are attempting to bring, challenges before the Court. It is therefore appropriate to grant a stay in this regard.
- [17] As for the other matters sought to be stayed, and as agreed by the parties, the calculation of payment for alternate days has yet to be calculated by a labour inspector and recommended to the parties. The figure for holiday pay has similarly yet to be addressed by the parties but is surely capable of simple calculation. Ideally, the labour inspector's participation will address all monies deemed to be outstanding by Mr Stevenson (but which he cannot quantify) as well as the remedies determined by the Authority (but which also are yet to be quantified).
- [18] Not having argued it will not be able to recover the money I can only conclude that the Company's right of appeal will not be rendered nugatory if no stay is granted and money is paid to Mr Stevenson.
- [19] As both parties are challenging the original determination no issue appears to arise as to their *bona fides*.
- [20] There appears no novelty or importance as to the questions involved, particularly as the Company has already made an offer (of 5 days) to Mr Stevenson in respect of the alternate days calculation, and the issue of holiday pay will be determined by a finding by the Court after it considers, amongst other things, whether Mr Stevenson was owed it in the absence of any apparent agreement that he be paid on an 'as you go' basis (although that is what his pay slips purported to record) and a written employment agreement.

- [21] But, pending input by the labour inspector and the parties' consideration of his or her views as to quantum and (as provided for in the substantive determination) attempting to reach agreement on the same, there is no practical benefit in granting this part of the stay application.
- [22] I reach this view having regard to the above and the parties' obligation, consistent with the Act's promotion of mediation as the primary problem-solving mechanism, i.e. supporting parties resolving employment relationship problems on their own terms, to attempt to resolve the outstanding issues on their own terms. It is therefore not appropriate to grant the stay application until the parties have enjoyed the benefit of the labour inspector's input and cannot reach agreement on any quantum owed to Mr Stephenson.
- [23] The application for stay in respect of the penalty to be paid by the Company for breaching s65 of the Act is granted: leave is reserved for the stay to be reviewed in the event the Company is considered to be unnecessarily delaying the challenge process.
- [24] The application for stay in respect of non-quantified payment to Mr Stevenson for alternate days and holiday pay and interest is declined. Of course the Company is free to resubmit its application following input by the labour inspector and in the event agreement cannot be reached as to quantum.
- [25] I am satisfied costs are best addressed when all matters involving the Authority are resolved.
- [26] I repeat my earlier comments to the parties: at the heart of this tangle is a simple employment relationship problem struggling to find a fair and reasonable resolution. It is very much in the parties' interest to focus on that problem and its resolution, so as to keep costs proportionate and to reach finality. The Company has a modest business to operate: Mr Stevenson has found fresh employment. It is difficult to understand how prolonged litigation is to their benefit or in their interests.

Determination

- [27] The application for stay in respect of the penalty to be paid by the Company to the Crown for breaching s65 of the Act is granted: leave is reserved for the

stay to be reviewed in the event the Company is considered to be unnecessarily delaying the challenge process.

[28] The application for stay in respect of non-quantified payment to Mr Stevenson for alternate days and holiday pay and interest is refused.

[29] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority